NO. 83-438

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

WILBURN A. HENDERSON,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I. WHETHER A STATUTORY SCHEME THAT PERMITS UNFETTERED JURY DISCRETION IN DETERMINING IF A CRIMINAL DEFENDANT IS DEATH-ELIGIBLE VIOLATES EIGHTH AND FOURTEENTH AMENDMENT PROTECTIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT SET FORTH IN *FURMAN v. GEORGIA*, 408 U.S. 238 (1972)?

II. WHETHER A JURY QUALIFIED TO RENDER A DEATH PENALTY DENIES A CRIMINAL DEFENDANT TRIAL BY A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS?

III. WHETHER THE FAILURE OF A STATE TO ENFORCE A PROCEDURAL RULE THAT BARS EVIDENCE OF BAD CHARACTER RISES TO A VIOLATION OF FOURTEENTH AMENDMENT GUARANTEE TO DUE PROCESS OF LAW AS SET FORTH IN *HICKS v. OKLAHOMA*, 447 U.S. 343 (1980)?

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Petitioner, Wilburn A. Henderson (hereinafter Henderson), a prisoner facing death by electrocution in the Arkansas electric chair, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

OPINIONS BELOW

This petition is a direct request for review of the affirmance of the trial court judgment and sentence in this case by the Supreme Court of Arkansas. The only opinion of the Supreme Court of Arkansas is reported in *Henderson v. State*, 279 Ark. 414, 625 S.W.2d 533 (1983). A copy of the opinion is included in the appendix.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on June 13, 1983. The original certiorari petition was due on August 12, 1983. However, because of confusion resulting from an order of the Supreme Court of Arkansas, former appellate counsel believed that the certiorari petition was not due until September 12, 1983. A motion for extension of time to file the certiorari petition was obtained by that counsel — Jesse Kearney.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), with Henderson asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. . . .

Eighth Amendment, United States Constitution:

> . . . nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

> Section 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 404(a)(1)(b), Ark. Stat. Ann. §28-1001 (Repl. 1979):

> (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of the accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same. . . . (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Ark. Stat. Ann. §41-1501(1)(a) (Repl. 1977):

> A person commits capital murder if: (a) acting alone or with one or more other persons, he commits or attempts rape, kidnapping, arson, vehicular piracy, robbery, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . .

Ark. Stat. Ann. §41-1502(1)(a) (Repl. 1977):

> A person commits murder in the first degree if: (a) acting alone or with one or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . .

STATEMENT OF THE CASE

On November 26, 1980, an apparent robbery/murder took place at a used furniture in Fort Smith, Sebastain County, Arkansas. The victim — Willa O'Dean — was found in the store by customers and a mailman at approximately 2:00 p.m. No one was seen leaving the store at the time of the murder and no physical evidence was apparent. The only possible expection is that a folded piece of paper was found on the floor approximately six feet from the body of the victim.

The piece of paper had the floor plan of a cabin and the name of a realtor. By contacting the realtor and the person leasing the cabin, police were able to determine that Wilburn A. Henderson had shown an interest in that cabin a few days before the robbery/murder. Based upon this information, the police began looking for Henderson.

A few weeks later Henderson was located in Houston, Texas. He was taken into custody by Texas authorities and later questioned by Fort Smith detectives working on the case. An exculpatory in-custodial statement was given by Henderson. In the statement he suggested that another person — Ollie Brown — had committed the murder and, that Brown had threatened to kill Henderson if he revealed that fact. (Brown was dismissed as a suspect after he was later questioned).

Henderson contended in pretrial motions that the statement was given because he was afraid of the Houston authorities. They had threatened to shoot him and he was willing to say anything to be taken out of Houston and back to Arkansas. He admitted that the Fort Smith police had not threatened him. Based upon this information the Sebastian

Circuit Court denied the suppression motion and permitted the statement into evidence.

The Court did suppress certain conversations between Henderson and his wife — Selena Henderson — because of the husband/wife privilege. (These statements were reported in the local news media during a first trial and, because jurors — rushing home to see themselves on television — heard this information, a mistrial was declared).

In pretrial motions Henderson challenged the constitutionality of Arkansas capital murder statute when read in conjunction with the statute on murder in the first degree. Henderson contended that since the jury or prosecutor could — exercising total discretion — decide which robbery/murder was capital murder and which murder in the first degree, the statute was invalid. The Arkansas Supreme Court had said that such a statutory scheme was permissible.

Henderson also challenged the manner in which the jury was selected. Henderson asserted that a jury chosen in such a manner to exclude automatically those persons that were opposed to the death penalty — a "death qualified" jury — denied him trial by a fair cross section of the community as guaranteed every other criminal defendant. The motion to not death qualify the jury was denied and Henderson's jury was selected in this manner.

The State's case against Henderson was purely circumstantial. No witness put Henderson at the store at the time of the killing. A gun that had been pawned by him that day had similar class characteristics as the weapon used in the murder. The weapon used in the murder was a common one according to the State ballistics expert. The

fingerprints found in the store and on the piece of paper that made Henderson a suspect in the first place not only did not match Henderson's but, were not even similar.

During the jury trial Henderson took the stand in his own defense. He refuted the inculpatory parts of his statement and asserted that fear of the Houston police led him to make statements that would at least have him brought back to Arkansas. He claimed that the atmosphere at the time he made the statement was oppressive.

Henderson also denied killing the victim in this case or committing the robbery. He admitted that he had been in the store a few days before looking for furniture for a house he was hoping he could rent with his wife — Selena. He stated that he also went to other stores.

Henderson detailed his movements on the murder. His testimony was supported by both witnesses for the State and his defense witnesses.

On cross-examination the prosecution began questioning Henderson's character by pointing out evidence of his prior marriages and, by asking about aliases that he had used in the past. Henderson had never put his good character into evidence. The trial court permitted this questioning and the Supreme Court of Arkansas affirmed despite an evidentiary rule that clearly forbids such evidence. (This evidence was referred to on several occasions during the penalty phase of Henderson's trial).

The jury convicted Henderson of capital murder. After a separate hearing to determine punishment (Ark. Stat. Ann. §§41-1301, *et seq* (Repl. 1977)), the jury sentenced him to death by electrocution. The jury found two aggravating circumstances: (1) That the capital murder

was committed by someone that had previously committed an offense involving the use or threat of force or serious physical injury to another person; (2) That the capital murder was committed for pecuniary gain.

Despite the fact that evidence was introduced showing that Henderson was not a problem in jail and, in fact, had been very helpful in getting younger offenders to straighten out their lives, the jury found that no mitigating evidence had been introduced. Making the required findings under Arkansas law, the jury sentenced Henderson to death by electrocution.

The case was appealed to the Supreme Court of Arkansas. The Court rejected arguments concerning the statute and the death qualified jury. While never stating that it was not error to permit testimony about Henderson's former wives or aliases, the Court concluded from its review of the record that there was no prejudice in this questioning.

From the rulings on the constitutionality of the Arkansas statute; the use of a "death qualified" jury to determine the issue of guilt; and, the failure of the Supreme Court of Arkansas to enforce a procedural rule, Henderson brings this petition for writ of certiorari and asks that the Court vacate his conviction and sentence.

REASONS FOR GRANTING THE WRIT

I. A STATUTORY SCHEME THAT PERMITS THE JURY OR PROSECUTOR TO ARBITRARILY SUBJECT A CRIMINAL DEFENDANT TO THE DEATH PENALTY OR TO A SUBSTANTIALLY LESSER PENALTY WITHOUT ANY GUIDANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AS HELD IN *FURMAN v. GEORGIA*, 408 U.S. 238 (1972).

This Court held in *Furman v. Georgia*, 408 U.S. 238 (1972) that a death penalty statute could not stand if it failed to adequately channel the sentencing decisions of juries. To pass constitutional muster, the statute must contain adequate safeguards to assure that the persons subjected to the death penalty are sentenced upon the basis of articulable standards. *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court has not retreated from this position. *See, Zant v. Stephens*, —— U.S. ——, 77 L.Ed. 2d 235 (1983).

Attacks have been made since *Gregg v. Georgia, supra*, on individual aggravating circumstances, *Godfrey v. Georgia*, 446 U.S. 420 (1980); and on a sentencing process that denies the opportunity for consideration of mitigating factors, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). In all of these decisions, the Court has consistently held to the principle that as long as there is an assurance in the statutory scheme that the fact finder will not be arbitrary in making a defendant death-eligible, or in imposing the death penalty, that statutory scheme will be upheld. *Zant v. Stephens, supra.*

Arkansas' statutory scheme fails even before the case reaches the penalty phase of a capital case. This Court should review this scheme to assure that a jury's unfetter-

ed discretion will not be permitted prior to the penalty phase of a death case to raise a defendant to that tier in the proceedings that makes him "death eligible". The situation is exacerbated in Arkansas by opinions of the Arkansas Supreme Court that call for such unfettered discretion. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980).

The vagueness problem arises because of the overlapping nature of the statute defining the felony murder provisions of capital murder, and the statute defining the felony murder provisions of murder in the first degree. Ark. Stat. Ann. §41-1501(1)(a); §1502(1)(a) (Repl. 1977). The capital murder statute defines seven specific felonies that can lead to a conviction of capital murder if a death is caused during the course of one of those felonies. The murder in the first degree statute applies to "any," felony and has been interpreted to mean those included within the capital murder statute. This statute has never received plenary review by this Court.

The initial attack on this statute in Arkansas was in *Cromwell v. State, supra*. The case arose out of a charge of capital murder. However, the issue was the same because of the statutory definition of an attempted felony in Arkansas (Ark. Stat. Ann. §41-705 (Repl. 1977)). The statutes were attacked as being void for vagueness in that they permitted enforcement at the selective whim of a prosecutor or trial jury. *See, Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Rather than rejecting the proposition that the Arkansas capital murder statutes provide arbitrary discretion on the part of the prosecutor or jury, the Arkansas Supreme Court welcomed this discretion:

> The answer to this argument (of discretionary power) is that the possible exercise of such discretionary authority is not fatal to the statutes for even in capital cases, which this one is not, the evil to be guarded against is the capricious selection of a group of offenders . . . The actual wording of the statute may have been chosen to lighten the possible punishment that might be imposed for conduct falling within the strict definition of capital murder — a consequence that might be acceptable both to the prosecution and to the defense. . . . (Explanation added) *Cromwell v. State,* 269 Ark. at 107, 598 S.W.2d at 736.

However, the problem with the overlapping nature of these statutes did not end here.

If the jury could blithely choose between robbery/murder as a death penalty eligible offense — Ark. Stat. Ann. §41-1501(3) (Repl. 1977) — or robbery/murder as an offense punishable by a minimum of ten years imprisonment or a maximum of life imprisonment (with the possibility of parole) — Ark. Stat. Ann. §41-901(1) (Supp. 1982) — then the defendant should have a right to tell the jury that the offenses were the same.

The Supreme Court of Arkansas agreed. In *Simpson v. State,* 274 Ark. 188, 623 S.W.2d 200 (1981), the Court reversed a capital murder conviction because the appellant was not given proper leeway in cross-examination. The Court went on to point out that on retrial the appellant would be entitled to inform the jury that capital murder and first degree murder, under the facts of the case, were composed of exactly the same elements. 274 Ark. at 194, 623 S.W.2d at 204.

However, when a jury told the trial court that it could not determine the difference between capital murder and murder in the first degree because the language was exactly the same, the Arkansas Supreme Court said "there is no impermissible uncertainty in the definition of the offenses." *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981). The Court also failed to mention in its opinion that the jury literally asked the trial court for the difference between the two statutory provisions. *See, Appendix "B".*

The Court has stood firm on its position that the statute is clear. *Simpson v. State*, 278 Ark. 334, 645 S.W.2d 699 (1983). As can be seen from reviewing Appendix "B", despite the Court's saying that there is no confusion, the *juries are asking for help* because of the confusion between the two statutes.

Such a statutory scheme must be declared void-for-vagueness. Otherwise, a jury is permitted unfettered discretion and can sentence a one defendant to death for exactly the same crime that results in a lesser conviction for a co-defendant. *Compare, Anderson v. State*, 278 Ark. 171, 644 S.W.2d 278 (1983); *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

In conclusion, Arkansas has a statutory scheme that does not provide meaningful guidance to the jury in determining if a defendant is death eligible. Henderson objected to this statutory scheme prior to trial and asked that the charge be reduced to the lesser offense of murder in the first degree. The motion was denied by the trial court.

As noted above, the Arkansas Supreme Court refuses to seriously address this issue further. This Court should grant the petition, set this matter for argument, and

declare that a statutory scheme that permits unfettered discretion by the jury in determining that a defendant is death-eligible violates the Eighth and Fourteenth Amendment protections against cruel and unusual punishment.

II. A CRIMINAL DEFENDANT IS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY WHEN THE JURY EXCLUDES FOR CAUSE THOSE PERSONS OPPOSED TO THE DEATH PENALTY.

The defendant in a criminal case has a constitutional right to be tried on the issue of guilt by a jury comprised of a cross section of the community. *Duren v. Missouri*, 439 U.S. 357 (1979). However, under a procedure suggested by this Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (hereafter *Witherspoon*), the jury in a death penalty case excludes an identifiable class of persons for cause on the issue of guilt because they are opposed to the imposition of the death penalty. Prior to trial, Henderson attempted to get the Sebastian Circuit Court to avoid this violation of his Sixth and Fourteenth Amendment rights by stopping death qualification of the jury. The motion was denied and the Arkansas Supreme Court affirmed.

The issue of whether a death qualified jury is prosecution prone or denies the defendant a jury comprised of a *fair* cross section of the community was suggested in *Witherspoon*. At that time, because of the tenative nature of the data in support of this position the Court was unwilling to impose a *per se* rule against qualifying juries to impose a death penalty. Since that time numerous studies

have been completed that support the idea that a jury chosen in a death penalty case is different in form and substance from those chosen in any other criminal trial. *See, e.g.*, Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 Woodrow Wilson J.L. (1981); Haney, *Juries and the Death Penalty: Readdressing the Weatherspoon Question*, 1980 Crime & Delinq. 512 (1980).

Henderson contends that to prevent him from being tried on a capital murder charge with the type of fair cross section jury to which he would be entitled if he were only being tried on the underlying felony of robbery is unconstitutional. More to the point, Henderson asserts that this Court should grant certiorari to consider this important question.

Mr. Justice Douglas foretold this issue in his separate opinion in *Witherspoon* when he pointed out that all defendants were entitled to a cross section jury on the issue of guilt. 391 U.S. at 531. Although he recognized that the conscience of the community (which must be adhered to in determining whether the death penalty is appropriate in a given case) may vary from community to community, the attitudes towards the death penalty really had no bearing on the determination of the defendant's guilt. Hence, to exclude those persons from the jury because of this viewpoint effectively denied Sixth and Fourteenth Amendment protections to the defendant.

Indeed, in Arkansas the problem is ever greater. A defendant in a trial involving a maximum sentence of a term of years is entitled to a new trial if the trial court and prosecutor force a potential juror to state before hearing any evidence that they could impose a lengthy prison

sentence. *Haynes v. State*, 270 Ark. 685, 606 S.W.2d 563 (1980). Or, as the Court stated:

> The question in capital cases is whether the juror would vote for death under any circumstances, not whether he considers the penalty excessive for the crime charged in the case before him.
>
> There is usually no similar emotion feeling in regard to imprisonment for a certain number of years. No conscientious juror should be required to say in advance of the trial whether he would consider the maximum penalty to be excessive. 270 Ark. at 691, 606 S.W.2d at 565.

Hence, the capital defendant is denied not only a cross section jury in Arkansas but, is forced to trial with a jury chosen unlike any other trial jury — *i.e.*, by a jury that is asked extensively about the maximum punishment in the case even before it has heard any of the evidence.

This Court has concluded that if a "distinctive," group is shown to be systematically excluded from a potential jury panel then the criminal defendant is denied trial by a fair cross section of the jury. *Duren v. Missouri, supra.* It is not easy to determine exactly what comprises a distinctive group and the Court has been reluctant in undertaking such evaluation. But, in the death qualification process the studies show that the group automatically disqualified includes the poor, women, blacks and certain ethnic and religious groups. *Grigsby v. Mabry*, 483 F. Supp. 1372, 1384 (E.D. Ark. 1980), *aff'd as modified*, 637 F.2d 525 (8th Cir. 1980).

If the showing is made that a systematic exclusion has occurred, then the State must justify that process. But,

while there is justification of excluding persons opposed to the death penalty from a penalty phase, there is no jurisdiction to exclude them from the guilt/innocence phase. This point has been tacitly recognized by this Court in *Adams v. Texas*, 448 U.S. 38 (1980).

The question then becomes whether a jury qualified to render a death penalty violates the defendant's Sixth and Fourteenth Amendment rights to fair and impartial jury comprised of a cross section of the community and, if so, whether such a process should be ended. Henderson contends that the answer to this question is clearly yes. *See, Grigsby v. Mabry*, —— F. Supp. —— (E.D. Ark. August 5, 1983).

The Court should grant certiorari to this matter to consider this question. Upon review, Henderson's conviction and sentence should be vacated and this matter remanded for trial on the issue of guilt by a jury that represents a cross section of the community and, if necessary, a separate jury on the issue of punishment.

III. THE FAILURE OF A STATE JUDICIAL SYSTEM TO ENFORCE EVIDENCE RULES DESIGNED TO PREVENT INADMISSIBLE CHARACTER EVIDENCE BEING PRESENTED TO THE JURY VIOLATES A CRIMINAL DEFENDANT'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AS STATED IN *HICKS v. OKLAHOMA*, 447 U.S. 343 (1980).

The question is whether the failure of a state trial court — and later a state appellate court — to prevent the

State from using irrelevant, collateral, prejudicial evidence can rise to a federal constitutional right to Due Process of Law under the Fourteenth Amendment. The Court has ruled that the failure to follow a state procedural statute can constitute such a Due Process violation. *Hicks v. Oklahoma,* 447 U.S. 343 (1980). Henderson contends that under the facts of this case such a violation should be declared and this matter reversed and remanded for a new trial.

At issue is whether the prosecution should have been allowed to cross-examine Henderson about former wives that he had, former names that he had used, and a former occupation he had had as a minister. The questioning occurred specifically during the guilt phase of the trial over the objections of the defendant. It continued during the penalty phase of the trial as the State relied upon this inadmissible testimony in cross-examining Henderson's mitigation phase witnesses.

The Arkansas Supreme Court did not rule whether the questioning was proper. This issue was never addressed. The Court did rule, however, that the effect of this questioning was not prejudicial. In light of the fact that a specific rule of evidence precludes such testimony in Arkansas trials — Rule 404, Ark. Stat. Ann. §28-1001 (Repl. 1979) — the matter was prejudicial unless it could be held harmless beyond a reasonable doubt. *See, Chapman v. California,* 386 U.S. 18 (1967).

This Court has recognized that such evidence is inadmissible in a criminal case and can lead to reversal of a conviction. *Michelson v. United States,* 335 U.S. 469 (1958). Only when the defendant directly places his character in evidence can that character be attacked by specific instances of prior conduct. Rule 404, Ark. Stat. Ann.

§28-1001 (Repl. 1979). Henderson never placed his character in evidence in this case.

Henderson recognizes that this Court has scarce resources for the resolution of the many cases presented to it each year. *See, Michigan v. Long,* —— U.S. ——, 77 L.Ed. 2d 1201 (1983) (Stevens, J., dissenting). But, where a state procedural rule exists and is not followed to the detriment of a criminal defendant then, a federal constitutional right to Due Process of Law has been denied. At that point the issue becomes whether a federal question exists that can be addressed by this Court. *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In *Hicks, supra,* the direct question was whether a procedural statute that dealt with the degree of punishment a criminal defendant received could be raised to a federal Due Process question when the State failed to follow that statute. This Court said that it could be deemed such a violation because the defendant had a substantial expectation that he would be deprived of liberty only to the extent that a jury should impose penalty.

The question directly presented here is whether that ruling can extend further to evidentiary rules when the state courts fail to enforce those rules, or to provide relief upon the violation of those rules. The substantial question for the criminal defendant in such a case is whether he received a fair trial as guaranteed by the Sixth and Fourteenth Amendments. This case provides a clear example.

On the issue of whether he killed the victim in this case there was absolutely no reason to go years back into the defendant's past to find a time that he used a different name. Henderson attempted to have this procedure stopped before it was started but, the trial court would not sustain

his objection. The Arkansas Supreme Court merely stated that the material was not prejudicial. Yet, from the state of this record that assertion cannot be made beyond a reasonable doubt.

This Court should grant certiorari on the issue of whether such a claim can rise to federal constitutional proportions when the state courts fail to enforce a properly legislated rule of evidence. If so, then the Court should address whether that rule was enforced properly in this case or, at the least, vacate and certify the question to the Supreme Court of Arkansas to determine if the error were truly harmless beyond a reasonable doubt as that standard is defined in *Chapman v. California, supra.* If the error cannot be declared harmless beyond a reasonable doubt, the case should be reversed and remanded for a new trial.

CONCLUSION

Henderson was sentenced to death under a statutory scheme that unconstitutionally permits the prosecutor or jury unfettered discretion in determining if a particular defendant is to be declared death-eligible. Further, Henderson was not tried on the issue of guilt by a jury that represents a fair cross section of the community. Finally, the Court should reaffirm that when a state judicial system fails to give relief according to its statutes this failing by the State constitutes a federal due process violation and that this principle can be applied to state evidentiary rulings when they result in the defendant being denied a fair trial.

For the foregoing reasons, this petition for certioari should be granted; the matter should be set for briefing and

arguments; and, the conviction and sentence set aside and the matter remanded to the Arkansas courts for retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, counsel for petitioner herein, do hereby certify that a sufficient number of true and correct copies of the foregoing petition and accompanying appendix have been served on opposing counsel this 12th day of September, 1983, by mailing said copies, first class postage prepaid, to the Honorable J. Steven Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas, 72201.

/s/ Thomas M. Carpenter

Appendix

APPENDIX "A"

WILBURN ANTHONY HENDERSON

vs. No. CR 82-107

STATE OF ARKANSAS

Supreme Court of Arkansas
Opinion delivered June 13, 1983

RICHARD B. ADKISSON, Chief Justice. A jury convicted appellant, Wilburn Anthony Henderson, of capital felony murder, and he was sentenced to death by electrocution. On appeal from that conviction we affirm.

The victim was murdered at approximately 2:00 p.m. on November 26, 1980, while she was working in her family owned furniture store in Fort Smith, Arkansas. The autopsy revealed that she was shot once in the head with a .22 caliber pistol and died instantly. The police arrived at the crime scene at about 2:15 p.m. and found the victim lying face down behind the counter. The cash register was open, and at least $41 was missing.

During the police investigation of the crime scene, one of the detectives found a piece of paper on the floor about six feet from the victim's body. The victim's daughter testified that it had not been there when she was in the store at 1:40 p.m. that afternoon. It was this piece of paper which led to the development of appellant as a suspect in the case. On the paper was a drawing of a floor plan, two phone numbers, an address, and the name of a real estate agent. When contacted by the police, the agent recognized the drawing as the floor plan of a cabin he was trying to rent. It was then discovered that appellant had looked at the

cabin, and had had an appointment with the agent to talk about renting it at 4:30 p.m. the day of the crime; appellant failed to keep this appointment. Appellant was eventually traced to Houston, Texas, where he was picked up by the Houston police. Appellant gave a statement in Houston to the Fort Smith police in which he admitted that he was in the store at the time of the murder, but stated that an acquaintance killed the victim. The acquaintance was questioned, released, and later testified at trial.

There was additional evidence linking appellant to the crime. The investigation revealed that appellant had redeemed a pawned .22 caliber pistol on November 24 but had pawned the pistol again on November 29. A female acquaintance of appellant testified that appellant acted peculiarly when a television report gave a description of the subject sought in the murder. She also testified that appellant told her that the Fort Smith police were looking for him regarding a murder and that if the police asked about him, to tell them he had telephoned from Kansas City. In addition, she was to tell anyone that asked that he still had his moustache, even though he had shaved it off. It was also established that when appellant left for Houston, he abandoned the van he was driving on the day of the murder.

After viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence to support the jury's finding of guilt.

Appellant argues that our capital murder statute is unconstitutionally vague. We reject this argument. We have upheld the constitutionality of this statute on numerous occasions. In this regard, see *Simpson v. State,* 278 Ark. 334, —— S.W.2d —— (1983); *Ford v. State,* 276 Ark. 98, 633

S.W.2d 3 (1982); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

Appellant alleges that the capital murder sentencing statutes are unconstitutionally vague for three reasons: First because the aggravating circumstances of Ark. Stat. Ann. §41-1303 (Repl. 1977) are too closely related to the elements of capital felony murder as set out in Ark. Stat. Ann. §41-150 (Repl. 1977); this contention was answered in *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981) where we held that the aggravating circumstances are not an element of capital murder. Secondly, appellant points to the fact that there is no specific definition of "mitigating circumstances" in Ark. Stat. Ann. §41-1304 (Repl. 1977); however, we have held that the fact that the jury is not limited to specifically enumerated mitigating factors accrues to the benefit of the defendant, because it gives the jury a greater opportunity to extend leniency to him. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980). Thirdly, appellant argues that our sentencing statutes are unconstitutional because there is no accurate comparison of death penalty cases, since not all such cases are appealed and those that are do not always contain complete records; in answering this contention we note that it is highly unlikely that any death case will not be appealed; the constitutionality of our appellate process in death penalty cases was upheld in *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977); appellant's allegation that the records in death cases are inadequate has no merit.

Appellant argues that the trial court erred in excusing for cause a juror who stated that she could not under any circumstances impose the death penalty, thereby allowing a "death qualified" jury to determine his guilt or innocence.

More specifically, appellant argues that since Ark. Stat. Ann. §41-1302 (Repl. 1977) does not *require* that a jury be composed only of members who can recommend the death penalty, persons who cannot impose the death penalty should be allowed to sit on the jury. However, the statute contemplates that persons on the jury will be capable of imposing the death penalty. It is not error for the court to strike for cause persons who cannot carry out the law. *See Haynes v. State,* 270 Ark. 685, 606 S.W.2d 563 (1980). Appellant's contention that a death qualified jury is more conviction prone was rejected in *Lasley v. State,* 274 Ark. 352, 625 S.W.2d 466 (1981), and appellant's argument concerning a bifurcated trial, with one jury for determining guilt or innocence and another one for sentencing, was rejected in *Hill v. State,* 275 Ark. 71, 628 S.W.2d 285 (1982).

Appellant also alleges that the trial court erred in not granting his motion for expert witnesses to testify at a hearing on the issue of a death qualified jury. The court satisfied appellant's request by allowing appellant to introduce several documentary studies on this issue:

> The Court: We will resume the hearing on Wilburn Anthony Henderson. On Defendant's Motion for Witness Fee, Expert Witness Concerning Exclusion of Veniremen, defendant was allowed to introduce several studies or papers. Does that satisfy your request for a witness in this matter, Mr. Settle?
>
> Mr. Settle: [Defense attorney]
>
> The court has accepted these documents into evidence?
>
> The Court: Yes.
>
> Mr. Settle: And accepted it as evidence to the other motions I filed?

The Court: Yes, sir.

Mr. Settle: All right, sir.

The Court: That motion will be satisfied.

Appellant made no objection to this ruling, and under these circumstances, this point has not been properly preserved for appeal.

Appellant argues that the trial court erred in refusing to suppress the statement he gave to a Fort Smith detective while incarcerated in Houston. This argument is without merit. Although an in-custody statement is presumed to be involuntary, in this case the State has met its burden of proving that appellant's statement was made voluntarily, without hope of reward or fear of punishment. *Watson v. State*, 255 Ark. 631, 501 S.W.2d 609 (1973). At the pretrial hearing to determine voluntariness, a verbatim transcript of appellant's recorded statement was introduced into evidence. The transcript reflects that appellant was asked if he was treated fairly, to which he responded, "Yes, sir," and that he was given an opportunity to say anything he desired concerning the voluntariness of his statement at the end of the interview. He responded that he had nothing more to say. The detective who took the statement testified that he advised appellant of his *Miranda* rights, that appellant agreed to make a statement, and that no promises, threats, or coercion were used to obtain the statement. At trial appellant testified that the statement was involuntary because he was frightened since the Houston police officer, who took him in, told him if he attempted to escape he would "blow him away." However, that officer did not question him and was not present when he gave his statement. Appellant admitted that the interrogating officers did not abuse him in any way. Therefore, even in light of

appellant's testimony at trial, the trial court's finding of voluntariness will not be disturbed on appeal.

Appellant next argues that the trial court erred in admitting a photograph of the victim taken in the autopsy room. The photograph depicted the area of the wound and it enabled the jury to better understand the testimony of the state medical examiner. The admissibility of photographs is within the sound discretion of the trial court, and will not be set aside absent a manifest abuse of discretion. *Roleson v. State,* 277 Ark. 148, 640 S.W.2d 113 (1982). Here, we cannot say that there was an abuse of discretion. Appellant argues that the admission in evidence of the autopsy report was error; the admission in evidence of an autopsy report is permitted by Ark. Stat. Ann. §42-1220 (Supp. 1981).

Appellant also alleges that p. ejudicial error occurred when he had to object to certain photographs proffered by the State. We cannot agree. The discussions concerning the photographs occurred at the bench. We find no prejudicial error in this regard.

Appellant contends that the trial court erred in refusing to sequester the jury during his trial. To support this argument, appellant points to the fact that his first trial ended in a mistrial because of publicity and the fact that there was television and newspaper coverage surrounding his second trial. The decision of whether or not to sequester the jury is left to the discretion of the trial court. Ark. Stat. Ann. §43-2121 (Repl. 1977). The trial court's decision will not be disturbed in the absence of a clear showing of prejudice. *Perry v. State,* 277 Ark. 357, 642 S.W.2d 865 (1982). Here, appellant has failed to demonstrate the necessary showing of prejudice. Each juror was thoroughly questioned about media influence, and each one selected was

admonished to refrain from discussing the case, reading about it in the newspaper, or listening to radio or television reports. Appellant is not entitled to a jury completely ignorant of the crime. *Anderson v. State*, 278 Ark. 171, —— S.W.2d —— (1983). It is sufficient if the juror can lay aside his opinions and render a verdict based on the evidence presented in court. *Kellensworth v. State*, 276 Ark. 127, 633 S.W.2d 21 (1982).

Appellant argues that the trial court erred in instructing the jury as to the lesser included offense of second degree murder, AMCI 1503. He cites *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980) for the proposition that the State must choose either the capital murder instruction or the second degree instruction, but not both. Such reliance is misplaced. This court has held that the jury should have the opportunity to consider lesser included offenses where the evidence warrants, even if the defendant objects. *Caton and Headley v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972). In any event, appellant was clearly not prejudiced by the submission of the second degree murder instruction since the jury convicted him of the greater offense of capital felony murder.

Appellant also alleges that it was error to give AMCI 1501-A, the Capital Murder — Associated Felony instruction, because it was cumulative of AMCI 1501, the Capital Murder instruction. This argument is without merit. The "note on use" following 1501-A explains:

> A charge of capital murder committed in the course of one of the felonies specified in Ark. Stat. Ann. §41-1501(a) (Repl. 1977) will require proof of that felony. This instruction is designed for use in defining

the felony if requested by either party or if the court feels it would be helpful to the jury.

Here, appellant was charged with murder committed during the course of a robbery; therefore, it was not error for AMCI 1501-A defining robbery to be given.

Appellant argues that the trial court erred in allowing the State to ask appellant certain allegedly irrelevant and prejudicial questions concerning a previous marriage and other names he had used in the past. Appellant alleges that he was prejudiced by the State inquiring into these "morally stigmatizing subjects," but we cannot say from an examination of the record that these questions, standing alone, constituted prejudicial error.

We find no evidence that the jury's verdict was based on either passion or prejudice, nor do we find the imposition of the death penalty in this case to be arbitrary, capricious, or wanton. In our comparative review of death sentences, we find the sentence not excessive. *See Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372 (1981).

In the sentencing phase of the trial the jury received as evidence of aggravating circumstances four prior felony convictions in California for the felony crimes of rape, assault with a deadly weapon, assault by means of force likely to produce great bodily injury, and robbery. This evidence supported the jury's finding that appellant had previously committed another felony, an element of which was the use of threat of violence to another person. The jury found no mitigating circumstances. The jury's finding that the aggravating circumstances outweighed, beyond a reasonable doubt, any mitigating circumstances is supported by the evidence.

We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1977) and find no error. *See Earl v. State, supra.*

Affirmed.

APPENDIX "B"

STATE OF ARKANSAS

vs. No. CR 80-13

ALLEN COBLE

Craighead Circuit Court

TRANSCRIPT

(REPORTER'S NOTE: At approximately 1:15 p.m. the jury returned to Open Court; proceedings were as follows):

THE COURT: Do you have a question?

JUROR: Your Honor, we are having some difficulty over procedural matters and we would like — if any of the jury members would like to do so, I would like for them to frame their questions to you rather than me trying to tell you what they are curious about (R. 729) and if you will reinstruct us.

THE COURT: I will say this: At this stage of the trial, I am, under our procedures, rather limited in what I can tell you. If the question is one I feel I can properly answer, and I know the answer, I will do so. If the question is one that I feel that I cannot properly answer, I will have to tell you that. I am sure there may be many unanswered questions which you may have to answer, but we can't supplement the testimony. If it pertains to something you were wondering why wasn't proved, it is too late for that and you will have to do the best you can with what was presented.

JUROR: Your Honor, I think one of the two problems we have, some of us say one thing and some say another as

to what we were charged to do with the four sheets of paper.

THE COURT: First of all, you select a foreman, and then you take up and consider the charge of a capital murder. If your answer to that is guilty, you are finished and you come back in here. If your answer is not guilty, you then proceed to the first degree.

JUROR: Could you or the defense or the prosecuting attorney decipher between capital murder and first degree murder? (R. 730)

THE COURT: You have been instructed on that and it would not be proper for any of us to supplement that.

JUROR: Thank you. (R. 731)

(REPORTER'S NOTE: Thereupon, the jury returned to the jury room to deliberate their verdict. Proceedings were in Open Court as follows:) . . .

APPENDIX "C"

STATE OF ARKANSAS

vs. No. CR 81-46

WILBURN A. HENDERSON

Sebastian Circuit Court

TRANSCRIPT

MR. FIELDS: And when had you been divorced from your previous wife, the one you lived with here in Fort Smith?

W.A. HENDERSON: In June of the same year.

Q. Okay, and is that Elizabeth we're talking about?

A. Yes, sir. It wasn't recognized because it was a Mexican divorce.

Q. Okay, so, now when did you divorce her?

A. I divorced her in June through Mexican divorce.

Q. June what of 1980?

A. June 1st is when I got notification.

Q. Well, could it have been June 19th, 1981?

A. I'd have to look at my legal file, but I'm sure of that.

Q. Do you think you could recognize your signature?

A. Possibility. (R. 1509)

Q. Do you recognize that?

A. Yes, sir, I do.

Q. Okay, and that's June 19, 1981, isn't it?

A. This is an Annullment Agreement.

MR. SETTLE: Your Honor, could we approach the bench, please?

(The following discussion is at side bar, outside the hearing of the jury):

MR. SETTLE: Your Honor, I don't believe Mr. Fields — I've given him a considerable amount of leeway. I don't really see the relevance here of questioning the defendant about —

MR. FIELDS: Your Honor, he testified he was with his wife on November 26th, 1980; Elizabeth Henderson was his wife on that date.

MR. SETTLE: That's not correct, Your Honor.

MR. FIELDS: No, sir. Your Honor — Okay, he had married Elizabeth Henderson and there is a divorce here saying that he performed marriage ceremony with Elizabeth on May 4, 1979, and we are going to submit he might have been referring to the fact, you know, just by saying wife, he may have been referring (R. 1510) to Elizabeth Henderson, and that would put him in Fort Smith when he says he wasn't.

MR. SETTLE: No, Your Honor, it is clear that the State is trying to prejudice the defendant. The defendant has clearly stated he was with Selena and was living in Springdale and as we went over this before, the defendant was not married to Elizabeth on that date. He was married to Selena. We went into this before and I think the State is trying to go through the back door to prejudice the defendant.

MR. FIELDS: Your Honor, I'm also going to point out that he said he was having problems with Selena, and I think that problem was the fact that she found out about this earlier marriage to Elizabeth Henderson.

MR. SETTLE: I don't think that was the problem, Your Honor. I don't think that was the cause of the problem.

MR. FIELDS: She can testify to that and I've talked with her and that's what her testimony will be, and I'm going to ask him about that, since he has referred to the problems.

THE COURT: I will overrule the objection. (R. 1511)

MR. SETTLE: Note my exception.

(Discussion at side bar is concluded)

MR. FIELDS CONTINUES:

Q. Who is The Reverend W. A. Henderson?

A. Myself.

Q. Okay, are you a reverend?

A. Yes, I am.

Q. And who is Anthony Santana?

A. At one time —

MR. SETTLE: Your Honor, I object to this. I don't know what the relevance is and would like to approach the bench.

MR. FIELDS: Your Honor, we could tell him.

MR. SETTLE: Your Honor, can we approach the bench? I'd like to know the relevance.

(The following discussion is at side bar, outside the hearing of the jury):

MR. SETTLE: What does Mr. Fields think he's trying to do? I mean this isn't cross-examination. He's making a circus out of this thing.

THE COURT: Who is this last fellow?

MR. FIELDS: It's him.

MR. SETTLE: No, it isn't. (R. 1512)

MR. FIELDS: It's a name he has gone by. He said under oath that his name was W. A. Henderson. He's going to say that. If he doesn't we can prove it.

MR. SETTLE: That I'd like to see. How can you prove it?

MR. FIELDS: It's a name he has gone under. If he says "No," we can prove it. We've got the documents.

THE COURT: I think he'd be entitled to ask it.

MR. FIELDS: Thank you.

MR. SETTLE: Note my exception. (R. 1513)

(Discussion at side bar is concluded)